United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1237

UNITED STATES COURT OF
FOR THE SECOND CIRCUIT

TO BE ARGUED BY
JOSEPH ZUCKERMAN

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P/25

- -x

HARLEM RIVER CONSUMERS COOPERATIVE, INC.,

Plaintiff-Appellant,

DOCKET NO.
74-1237

-against-

ASSOCIATED GROCERS OF HARLEM, INC., et al.,

Defendants,

RETAIL, WHOLESALE & CHAIN STORE FOOD EMPLOYEES UNION, LOCAL 338, ASSOCIATED FOOD STORES, INC., FEDCO FOODS, INC., MID-EASTERN COOPERATIVES, INC., PIONEER FOOD STORES COOPERATIVE, INC., SHOPWELL, INC., SLOAN'S SUPER-MARKETS, INC., THEODORE SOLOMON, AARON KAUFMAN, and HARRY ROSENBLUM,

Defendant-Appellees.

- -x

BRIEF FOR DEFENDANT-APPELLEE RETAIL, WHOLESALE & CHAIN STORE FOOD EMPLOYEES UNION, LOCAL 338

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BRIEF FOR DEFENDANT-APPELLEE
RETAIL, WHOLESALE & CHAIN STORE
FOOD EMPLOYEES UNION, LOCAL 338

Preliminary Statement

This Brief is submitted by Defendant-Appellee RETAIL, WHOLESALE & CHAIN STORE FOOD EMPLOYEES UNION, LOCAL 338 ("Local 338") in response to the Brief for Plaintiff-Appellant, HARLEM RIVER CONSUMERS COOPERATIVE, INC. (hereafter sometimes referred to as "Appellant" and sometimes as "plaintiff") from its appeal of an Order entered by the Honorable Lawrence W. Pierce of the

United States District Court, Southern District of New York on February 7, 1974, as thereafter corrected on February 14, 1974.*

As can be seen from the Opinion (pp. 4, 31-32), the District Court dismissed after Appellant rested its direct case on December 27, 1973. At that time, the Defendant-Appellees had not yet put in any defense and indeed, at the District Court's urging, had limited or deferred cross-examination of Appellant's witnesses in an endeavor to expedite the presentation of its direct case. (Opinion p. 4).

During the course of the six week hearings, Appellant called nineteen witnesses, whose testimony encompassed approximately 3,000 pages, more than two-hundred exhibits were introduced into evidence, and, as the Opinion (pp. 4, 27, 30, fn. 28) indicates, every opportunity was extended to plaintiff to prove its allegations, including the admission of immaterial evidence and testimony and far ranging discovery into the records of defendants and

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*The thirty-nine page Memorandum Opinion and Order of the District Court is not yet officially reported. All references herein to that Memorandum Opinion and Order will be referred to herein as "Opinion" with the appropriate page reference. The District Court's Opinion dated February 7, 1974 is set forth in 1974 CCH Trade Cases ¶74,922. The CCH service has not picked up the District Court's February 14, 1974 Order which corrects certain typographical errors and makes a few minor changes in language.

non-defendants.

The Opinion is replete with detailed factual findings based on the documentary evidence and plaintiff's own witnesses. Only a few of the District Court's factual findings are challenged in the Appellant's Brief ("Appellant's Br.")

The only thing that Appellant proved in this voluminous record was that it, its competitors and the defendants encountered substantial food shortages during the summer and fall of 1973. The District Court thus found:

> "Despite the length of the hearing and the mass of evidence, plaintiff has shown neither that it has been discriminated against, nor that a group of defendants have combined to put it out of business. Instead . . . this hearing has shown that generally unstable economic conditions and even unpredictable weather conditions share the responsibility for a shortage of food which is endemic in the industry and which is the cause of plaintiff's plight. It is a plight suffered by plaintiff's competitors as well. Shortages, of one kind or another are, all too often, a fact of life in the United States in these times." (emphasis added).

Issues on This Appeal

1. Did the District Court abuse its discretion and commit clear and convincing error in dismissing Appellant's application for a further preliminary injunction after it rested its direct case where the evidence demonstrated that no discrimination had been practiced

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*There are only three citations to the voluminous transcript and only one reference to any exhibits in the Appellant's Br. (see pp. 2, 28, 30). In all other respects the record is ignored.

against plaintiff and where there was not a shred of evidence of a conspiracy to put it out of business?

2. Did the District Court abuse its discretion and commit clear and convincing error in dismissing Appellant's application for a further preliminary injunction where plaintiff's theories and contentions of wrongdoing were directed against non-defendants and there was not a shred of evidence of a conspiracy between those non-defendants and the Defendant-Appellees?

The Parties

Since the Appellant's Brief contains no description of the various entities who were primarily involved in the recently concluded preliminary injunction proceedings, set forth below is a brief general description of the ten defendants and one non-defendant primarily involved therein.

1. Appellant is a corporation which has operated a supermarket in Harlem since June, 1968.

2. Met Food Corporation ("Met") is a wholesaler of national brand grocery products. Met is not a defendant in this action. Met has been Appellant's principal supplier of national brand grocery products since May, 1969. Throughout the period encompassed by the preliminary injunction proceedings at issue, Met serviced plaintiff and its other customers in Harlem and elsewhere.

3. Defendant Mid-Eastern Cooperatives ("Mid-Eastern") is a wholesaler of national brand and private label grocery products. Appellant last did business with Mid-Eastern in April, 1969.

4. Defendant Associated Food Stores, Inc. ("Associated") is a voluntary wholesaler of grocery products. Appellant has never sought to purchase merchandise from Associated. Associated sells its products to independent retailers, some of whom have joined together for the purpose of trading under the trade designation Associated Stores.

5. Defendant Pioneer Food Stores, Inc. ("Pioneer") is a cooperative wholesaler which sells exclusively to members of the Pioneer Association -- a group of stores separately and independently owned and trading under the name Pioneer.

6. Local 338 is an AFL-CIO affiliated labor union which is the bargaining agent for some 15,000 clerks and other food employees in supermarkets and grocery stores in the Greater New York area. It has collective bargaining agreements with large and small supermarkets, including those owned by some of the defendants herein, to wit, Shopwell, Inc. ("Shopwell"), Sloan's Supermarkets, Inc. ("Sloan's"), Fedco Foods, Inc. ("Fedco") and Aaron Kaufman ("Kaufman").

7. Defendants Shopwell, Sloan's and Fedco own and operate chains of supermarkets in the Greater New York area.

8. Defendant Kaufman is an officer and shareholder of a supermarket in Harlem. Kaufman's supermarket is now a member of the Pioneer Association and buys its dry grocery products from Pioneer.

9. Defendant Harry Rosenblum ("Rosenblum") operated a supermarket in Harlem until he and it went into bankruptcy proceedings in early 1973. Rosenblum had been a customer of Met prior to the time that his store was foreclosed and sold during those bankruptcy proceedings.

10. Defendant Solomon ("Solomon") is the executive secretary of a defunct or a practically defunct grocers' association, defendant Associated Grocers of Harlem, Inc. ("AGH"). AGH was released from participation in the proceedings for a further preliminary injunction by plaintiff's attorney.

There are approximately thirty-five other defendants in this action who, with certain exceptions, will not be further identified or referred to herein because they were all released from participation upon the statements of Appellant's attorney that they were not involved in the situation which gives rise to its application for further preliminary injunction proceedings. Those persons so

released include "core" defendants L. Joseph Overton, Lawrence J. Overton ("the Overtons"), Hulan Jack, Coordinated Community Services, Inc. ("C.C.S."), etc.

The Complaint

Little need be said about the complaint served in 1970 for the simple reason that the matters raised by plaintiff in the recently concluded preliminary injunction proceeding are wholly extraneous to the allegations of the complaint.*

The complaint contains three claims. The first claim asserts that AGH, CCS, the Overtons, Hulan Jack, Solomon, Rosenblum and others combined in violation of the antitrust laws to control the retail food business. The combination is alleged to have been accomplished as follows: (a) AGH, CCS and the individual defendants "were able to" threaten the defendants manufacturer-distributors with loss of business of AGH members if they sold to non-consented to retail stores; (b) the control of the Overtons over labor in Harlem through Local 338 would cause labor disputes with such stores; (c) said individual defendants had strong political ties that "enabled

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* While the District Court recognized in (Opinion p. 35, fn 12), that "there was a serious question as to whether or not the allegations in the complaint were sufficient to support this motion charging somewhat different violations of the antitrust law, occurring long after the complaint was filed," the six-week hearing was nevertheless conducted.

them" to harass retail stores through City agencies, etc.

It is further alleged that plaintiff's supermarket did not open with the consent of AGH, C.C.S. and the individual defendants because it refused to adhere to the desires of C.C.S. respecting six products promoted by C.C.S. The complaint also alleges that the said defendants caused Local 338 on or about April 21, 1969 to claim and maintain a labor dispute with plaintiff which included a picket line in violation of the antitrust laws.

The second claim in the complaint alleges a separate conspiracy amongst some twenty-seven defendant-manufacturer-distributors to refuse to sell their products to plaintiff. The third claim asserts a violation of the laws of the State of New York.

As will be seen in greater detail below, the matters alleged in the complaint have nothing to do with the issues at bar. For example, Local 338's labor dispute with plaintiff, which is referred to in the first count of the complaint, ended upon the issuance of a temporary injunction granted by Hon. Walter L. Mansfield, U.S.D.J. on November 25, 1970. Since that date, Local 338 has had no dealing with plaintiff and has faithfully adhered to each and every provision of that temporary injunction.

Moreover, as noted above, the primary "core" defendants referred to in the complaint, i.e., Jack, the Overtons, C.C.S. and AGH were released from the recently conducted preliminary injunction proceedings on the representation of plaintiff's attorney that they were not involved. Based on similar representations by that attorney, twenty-six of the manufacturer distributor-defendants referred to in the second count of the complaint were released from participation.

Plaintiff's Motion for A Further Preliminary Injunction

The Motion Papers In Support of Further Preliminary Injunctive Relief

On October 26, 1973, plaintiff submitted five affidavits in support of a motion for a preliminary injunction. None of the moving affidavits mention Local 338, and none claimed that Local 338 had or was engaging in conduct violative of Judge Mansfield's Order or was engaging in any other conduct harmful to plaintiff.*

The main thrust of the moving affidavits** was that Met

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* Similarly, the moving affidavits make no mention of any of the other alleged "core" defendants or the vast majority of the other defendants.

** The various moving affidavits are referred to herein by the last name of the affiant, the abbreviation "Aff." and a paragraph reference. Citations to the transcript of the hearing before Judge Pierce are referred to herein as "Tr." with the requisite page number.

a non-defendant wholesaler had, during the period beginning August 28 through October 24, 1973, failed to deliver many critical food staples in plaintiff's business. Harris Aff. ¶¶ 22(d), 23, 24; Glenn Aff. ¶ 4; see also Dolly Aff. ¶ 5. For example, the moving affidavit of Harris (¶ 24) charged plaintiff had "gone for weeks at a time without a can of sweet potatoes, tomatoes, peaches, apple-sauce, salmon, tuna-fish or rice" because Met had not delivered those products.*

Similarly, plaintiff's Treasurer, Mrs. Glenn, filed an affidavit which described an alleged shopping trip to two competitive stores serviced by Met at which she purchased fifty items that Met had failed to deliver to plaintiff that week. (Glenn Aff. ¶¶ 4, 5).**

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*On cross-examination, Mrs. Harris admitted that Met's delivery invoices to plaintiff reflected deliveries of quantities of each of those products to plaintiff each and every week. (Tr. e.g. 1343-56, 1364-5; P. Ex. 85B; Local 338 Exs. G, H, I, J and K). For example, Mrs. Harris testified on cross-examination (Tr. 1353-6) and Met's delivery invoice (Pl. Ex. 85B) shows that on October 24, 1973 Met delivered nine cases of Motts applesauce, fifteen varieties of tomato products, fourteen cases of Uncle Ben's rice, seven cases of Carolina Rice, six different sizes and brands of tuna fish, etc. That delivery was made on the very day that Mrs. Harris signed her affidavit and swore that plaintiff had not received a can of those products for weeks.

**Cross-examination similarly demolished Mrs. Glenn's alleged comparative buying tour. It was thus shown that of the fifty items which she claimed Met had failed to deliver that week, 14 were in fact delivered (Tr. 2599-2609) and 5 other items had not even been ordered by plaintiff (Tr. 2609-14). The E&B store at which Mrs. Glenn purchased most of the items on her buying trip had not purchased dry groceries from Met since June 20, 1973 -- three months
(fn. continued on p. 11)

Since the moving affidavits acknowledged that Met had been delivering products to appellant since May, 1969, and indeed throughout the entire labor dispute between Local 338 and plaintiff, it was apparent from the face of the moving affidavits that plaintiff did not contend that the union had or was conspiring with Met.

Not content with charging non-defendant Met with discrimination, the affidavit of plaintiff's attorney charged that:

> "due to exclusive dealing agreements, Plaintiff is denied the right to purchase the volume of national brand products directly from the national manufacturer or directly through the Brokers representing said manufacturers, within the Greater Metropolitan area."
>
> (Walker Aff. ¶8; see also id, ¶11.)*

**(cont'd. from p. 10) prior to Mrs. Glenn's buying trip (Tr. 2449, 2461-6, 1616-20; see also 2449). The District Court further found (Opinion p. 37, fn 22) that the other store visited by Mrs. Glenn was not only outside the alleged Harlem target area, but also that 18% of the cases which it had ordered from Met that week were not delivered.

Similarly, the cross-examination of Mr. Dolly, plaintiff's president, showed the various food items referred to in his affidavit which Met did not deliver were listed in Met's Cost Plus Book as being unavailable or out of stock (Tr. 2463-9). While those books were mailed to the plaintiff's store and every other Met customer each week, Mr. Dolly admitted that he did not bother to look at them before swearing in his affidavit that plaintiff was being discriminated against. (Tr. 2464-5, 2469).

*(fn see above) In that affidavit and in greater detail during oral argument on October 30, 1973, plaintiff's attorney represented that she had been advised of the existence of illegal exclusive dealing agreements by an officer of General Foods Corporation (See Oral Argument Oct. 30, 1973, Tr. 37-8). That officer, when called as plaintiff's witness, denied having made such statements and denied that his company had any such agreements with defendants or anyone else. (Tr. 2275-8). See also infra at p. 29.

Plaintiff's prayer for relief, thus sought a preliminary injunction against more than thirty food manufacturers and brokers of national brand grocery products, which would enjoin them from failing or refusing to fill the plaintiff's orders. See Appellant's Br. p. 18; Prayer for Relief, ¶1(a). The more than thirty manufacturers and brokers against whom such relief was sought were set forth in a list annexed to the affidavit of plaintiff's attorney.* None of those manufacturers or food brokers are defendants in this action.

Nowhere in the moving affidavits was it alleged or suggested that Local 338 had conspired with, communicated or had dealings with those non-defendant manufacturers or food brokers.

On October 30, 1973, on the return of this expedited motion, plaintiff submitted a document which purportedly listed all of the parties against whom it desired to proceed. Named as the offending parties were three defendant wholesalers, i.e., Associated, Pioneer and Mid-Eastern and three supermarket chains, i.e., Shopwell, Sloan's and Fedco. See Coop's Submission dated October 30, 1973;

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*They include the manufacturers and brokers of products such as Del Monte canned goods, Gold Medal Flour, Pillsbury, Libby's Canned Meats, Motts Apple products, Lever Brothers, Colgate-Palmolive Co., Bumble Bee, etc.

Oral Argument October 30, 1973, pp. 26-7. Local 338 was again not mentioned in that written submission.

Local 338 suddently became a participant in the preliminary injunction proceeding solely upon the oral representation of plaintiff's attorney that "it is the union influence that is a strong tie into what happens." (Oral Argument October 30, 1973 at pp. 30-1).*

Similarly, solely upon the vague oral statements of plaintiff's attorney, Kaufman, Solomon and Rosenblum became participants in the preliminary injunction hearing which ultimately lasted from November 1 through December 27, 1973 (Tr. Oral Argument October 30, 1973 Tr. 32, 51). For example, the only thing stated about defendant Kaufman is that "he is now part of Pioneer Food Stores" (Oral Argument Tr. 32). Rosenblum was somehow added even though plaintiff's attorney stated that:

> "We are not concerned with the CCS because we have no knowledge of them continuing to operate and neither with Hulan Jack, neither with Lawrence Overton, nor Harry Rosenblum who I have checked the records, and he has gone bankrupt in May of this year. We don't have any knowledge of Joseph Overton being involved." (Oral Argument Oct. 30, 1973 pp. 32-3). (emphasis added).

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*No explanation was given during that oral argument or at any other time subsequently as to how plaintiff contended Local 338 was involved or was "a strong tie into" the nationwide shortages in various food products.

That same day Judge Pierce entered an Order directing that a hearing on plaintiff's application for a preliminary injunction commence on November 1, 1973 against ten defendant-appellees at bar. The District Court elected to proceed even though the only claim clearly set forth in plaintiff's moving papers was directed against non-defendant Met. (Opinion pp. 10, 12).

Indeed, during the oral argument conducting during the morning of October 30, 1973, Judge Pierce repeatedly told plaintiff's attorney that the grievances appeared to be directed against non-defendants, particularly Met. (Opinion pp. 10, 12; Oral Argument Oct. 30, 1973, Tr. 40, 73-4, 76-7). Plaintiff's attorney was thus advised by Judge Pierce to make Met and the non-defendant manufacturers against whom it had grievances, defendants, by either amending the complaint or by serving a new complaint; and if that were done, the Court would then permit plaintiff to seek expedited relief by order to show cause. (Oral Argument October 30, 1973, Tr. 84). Plaintiff declined.

The Opinion of the District Court

After hearing nineteen witnesses called by plaintiff and reviewing the hundreds of documents introduced into evidence, the District Court dismissed plaintiff's application after it rested its direct case. In its Opinion, the District Court set forth a detailed factual and

statistical analysis (Opinion pp. 18, 20-23) which demonstrated that Met had not discriminated against plaintiff. Based upon that analysis, the District Court concluded:

> "First, there is no apparent pattern of discrimination against any particular customer. Throughout the period in question, the Co-op and its competitors have each sometimes suffered large percentages of scratches, and at other times, lesser percentage scratches. Thus, the fact that the Co-op's order of August 28, 1973 was 'scratched' 10% while Teitler's order of August 29, 1973 was 'scratched' 14% does not indicate that Teitler was in disfavor... The shifting positions of the various competitors is more likely attributable to such variables as Met's constantly revolving inventory, and the fact that supermarkets do not carry precisely the same brands, do not order precisely the same items each week, and do not necessarily require the same quantities of the same items on the same schedule. Further, they do not order with the same frequency, or on the same day. Therefore, the second fact which can be inferred from these figures is that during the relevant period all of Met's customers could expect their orders to be scratched, regardless of the variables, at a minimum of around 10% and that the risk, depending upon the variables, ran upwards 20% higher. The underlying documents also indicate that each store could expect and did receive an incidence of 'scratched' 'critical' products comparable to plaintiff's.
>
> "Other evidence elicited from plaintiff's witnesses strengthens this Court's conclusion that Met Food has not been systematically discriminating against plaintiff or any other customer discussed at this hearing." (emphasis added).

Similarly, after a thorough review of the purported "evidence" offered by plaintiff in an endeavor to prove the existence of a conspiracy in restraint of trade, the District Court stated:

> "Despite the length of the hearing and the mass of

> evidence*, plaintiff has shown neither that it has been discriminated against, nor that a group of defendants have combined to put it out of business." (Opinion p. 4).
>
> * * *
>
> "In other words, plaintiff has shown that the food industry in Harlem is most likely a community of common interests and goals. But it has not introduced a scrap of evidence from which this Court could infer that one of those interests and goals is to put plaintiff out of business, or to form an oligopoly to control the Harlem market." (Opinion p. 30). (emphasis added).

Judge Pierce further found that the problem of food shortages was not a problem which only concerned plaintiff and the other customers of its wholesaler Met. Rather, the District Court (Opinion pp. 4, 23-5, 36, fn. 26) found that during the summer and fall of 1973, food shortages of national brand products were endemic in the entire industry for such diverse reasons as the federal pricing regulations, bad weather conditions which delayed or curtailed the harvest of certain crops, an increase in food exports to other countries causing a drain on domestic supplies, etc. On this subject, the Court concluded that:

> "[I]t would seem that the entire food industry operated on short supplies during the period relevant to this hearing, and that its competitors fared no better than the Co-op. Thus, plaintiff has not met its burden of showing any probability of ultimately prevailing on the merits with respect to the issue of discrimination, as it has been raised in this hearing." (Opinion p. 25).

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*The Opinion (p. 39, fn. 28) makes clear that most of the purported "evidence" as to the existence of the alleged conspiracy was derived from prior depositions and interrogatories, that the defendants' objections to the admission of that material were "valid", that the Court admitted all of the material offered by plaintiff subject to connection, but since no conspiracy was found, there was no connection.

Significantly, the District Court further noted that "Plaintiff's own experts testified that food shortages had been forecast for 1973 since the beginning of the year" and that "cross-examination of plaintiff's operating personnel indicated that they could have taken measures which might have alleviated the impact of the short supplies." (Opinion pp. 23, 37, fn. 21).*

The Facts

The facts pertinent to this appeal are by and large set forth in the District Court's Opinion (at pp. 17-25, 30 and fns. 21-27).** We will, however, in the discussion infra of Appellant's contentions make additional reference to the evidence elicited during the six-week hearing.

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*The record thus discloses that plaintiff's operating personnel either failed to read or pay heed to numerous newspaper articles and weekly bulletins from Met predicting food shortages (Tr. 1339-42, 2075; Local 338 Ex. F; Shopwell Ex.A); that they first learned of shorages after August 28, 1973 (Tr 1340); that they disregarded the advice of Appellant's own consultant who had previously instructed them to build up a three to four week inventory of products if shortages were predicted (Tr. 788-93); and thus began the critical period of late August 1973 with no inventory in its basement or backroom. (Tr. 1337, 1342-3). In addition, the evidence demonstrates that while Met printed and mailed weekly bulletins - the Met Cost-Plus Books (Shopwell Ex. A), which listed products which were unavailable or rationed, plaintiff's store co-ordinator would only "sometimes" look at the Books. Even on those occasions when Mrs. Harris did look at those Cost Plus Books and saw that one size of a product was listed as unavailable, plaintiff did not order a larger quantity of the other sizes of the same product which were available. (Tr. 1563-5, 1569-71).

**While not pertinent to the issues in this appeal, there (fn. cont'd on p. 18).

Appellant Does Not Challenge Adverse Findings of the District Court

Although Appellant on this appeal has the burden in this Court of demonstrating that the District Court's many adverse factual findings were clearly erroneous, Appellant's Br., by its silence, concedes the accuracy and evidentiary foundation in the record of practically every adverse finding.

For example, Appellant cannot and does not challenge Judge Pierce's detailed statistical and factual analysis (Opinion pp. 21-3, 37, fn 22) which conclusively demonstrates

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**(cont'd from p. 17) are other "facts" referred to in the Court's Opinion which we do not adopt. For example, the Opinion (p. 7) notes in dictum that:

> "The Coop's business, freed from restraint, soared. By August of 1972, it had reached a weekly gross of around $47,000, considerably above its projections."

That statement ignores Appellant's April 1973 certified financial statements and other documents from its files which show that while its sales were "soaring", plaintiff (i) withheld in 1972 approximately $10,000 from its employees' salaries which it still owed to the I.R.S. in November, 1973; (ii) withheld in the spring of 1973 another $10,000 from its employees' salaries which was still unpaid to the I.R.S. in November, 1973; (iii) saw its net loss soar to $133,000 for the year ending April 1, 1973, vis-a-vis a net loss of approximately $119,000 for the prior year and (iv) saw its current liabilities to suppliers and other creditors climb to an all time high of approximately $411,000 while its cash, inventory and other current assets plummeted to $81,000 (see e.g., Local 338's Exs. Y-Y-2, Z, FF).

that Met has not discriminated against it or any other of its customers. Similarly, Appellant's Br. (p. 25) assumes the accuracy of the Court's findings at page 25 of the Opinion, where Judge Pierce wrote:

> "In conclusion, it would seem that the entire food industry operated on short supplies during the period relevant to this hearing, and that its competitors fared no better than the Co-op. Thus, plaintiff has not met its burden of showing any probability of ultimately prevailing on the merits with respect to the issues of discrimination, as it has been raised in this hearing."

Likewise, Appellant's Br. does not challenge the accuracy of the findings that the defendants, including both wholesalers and chain store operators, "were experiencing the same supply difficulties as plaintiff with respect to essentially the same national brand products." (Opinion pp. 23-4).

Moreover, those findings are fully supported by record. For example, the Opinion (p. 24) summarizes part of the detailed evidence elicited from defendant-appellee Mid-Eastern respecting the food shortages which it suffered during the summer and fall of 1973. The record abounds with similar evidence respecting the other defendants. Mr. Rose of defendant Sloan's, which buys its groceries from another wholesaler, non-defendant Krasdale, for example, testified that scratches to his chain "were running somewhere around 15% to 20% percent" during the late summer and early fall and that the products scratched included, Bumble Bee tuna, Del-Monte,

Libby and S&W peaches, Motts apple juice, Libby meats, paper bags, etc. (Tr. 254-5, 283-5, 289-91, 304-7). The primary reason for these shortages, according to Mr. Rose, was federal price regulation on food products which caused many manufacturers to hold back on shipments until the regulations were changed in order to permit a pass along of cost increases. (Tr. 289).

Additional testimony respecting shortages was elicited from officers of other defendants (e.g. Anastasio (Tr. 318-19, 322), Kaufman (Tr. 564-6)) and from plaintiff's own expert witnesses (e.g., Neumark*(Tr. 129-30, 133-4; see also 168-9) and Blythe (Tr. 788-93)). Their testimony was corroborated by documentary evidence. See, e.g., Sloan's Exs. A through G-5; Local 338 Exs. A-1 through B-1; 00; Pl. Exs. 51-3.

Indeed, on the crucial issues respecting food shortages and the alleged discrimination in the delivery of national brand grocery products, Appellant's Br. only challenges two of the District Court's findings.

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* Mr. Neumark, Appellant's first expert witness, testified that in discussing industry problems with key executives of 50 chains in various areas of the country, he learned that there was an industry wide problem throughout the country in "out-of-stocks due to manufacturers' inability to supply." (Tr. 129-30). That industry wide problem, reached its peak during the latter part of the summer (Tr. 133-4). That is also the period when plaintiff's problem in obtaining sufficient supplies from Met developed.

First: Appellant's Br. (p. 27) asserts that the District Court erred in giving great weight to the

> "oral statements of a witness Robert J. Collins, on cross-examination, which defied the written documents (Local 338's Ex. 00), which the illicit [sic] testimony was based."
>
> "The trial court obviously at p. 24-25 relied upon that testimony as the basis for holding, that 'the hostile forces of nature' were responsible for Plaintiff's lack of critical product of Carolina rice ....
>
> "In so doing the trial court completely overlooked Mr. Collins' testimony as to its direct supplying competitors, Associates, Daitch-Shopwell, Sloan's, Mid-Eastern and Pioneer."

The Appellant's Br. is mistaken on all counts.

Local 338 Ex. 00 referred to in the Appellant's Br. is a notice dated August 2, 1973 from the manufacturer of Carolina Rice to its food brokers, which reads, in pertinent part:

> "1. The '73 Rice Crop Year found supplies of Rough Rice dwindled to the lowest level recorded in over 25 years.
>
> "2. During the '73 crop year, demands for Rice domestically (U.S.A.) reached all time highs. Export demands also reached an all time high due to World Crop failures that sent sales to record levels.
>
> "3. The pressure on this Country to supply Rice to the underdeveloped countries has completely depleted this Country's inventory of Rough Rice."

The facts set forth in that notice, according to plaintiff's witness, Mr. Collins, the New York sales manager for Carolina Rice, were some of the primary reasons for the rice shortage (Tr. 2644-50).

In addition, Mr. Collins also testified (Tr. 2645-7) that in the beginning of September -- one month after that notice (Local 338's Ex. 00) was written -- a hurricane struck the scuthern United States, thereby delayed the harvesting of the incoming crop.*

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*That testimony is corroborated by documents in the public record. This Court may thus take judicial notice of Rice Situation Report (No. RS-22) published by the Economic Research Service of the United States Department of Agriculture in September 1973, which states, inter alia, (at pp. 3-4):

> "The summer of 1973 saw rice stocks plunge to their lowest level in 11 years, export demand pull at available supplies, ...
>
> ***
>
> [T]ropical storm Delia struck the southern rice area in early September, reducing crop prospects.
>
> ***
>
> "According to the weekly weather and crop bulletin, tropical storm Delia dealt a damaging blow to unharvested rice in Texas and Louisiana on September 4 and 5. The torrential rains and gusty winds caught the rice crops only about half harvested in these States. Plants on much remaining unharvested acreage have been blown down, some acreage flooded.
>
> ***
>
> "The harvest is running late, as much as 3 to 4 weeks in Texas and Louisiana, and by mid-September was only 79% and 55% completed respectively.
>
> ***
>
> "The sharp export demand in 1972/73 resulted in a sharp draw down to 5.1 million C.T.W. in stocks as of August 1, 1973. This was less than half the total of a year earlier and the lowest carryover since 1962/63. Rough rice stocks ... were the smallest on record." (emphasis added).

The District Court was requested to take judicial notice of that and other U.S. Department of Agriculture Reports in Defendants' Joint Factual Memorandum submitted when plaintiff rested its direct case.

Mr. Collins further testified that due to the rice shortage his company failed to fill many of the substantial orders placed by Associated, Met, Sloan's and Shopwell and its other customers. With respect to Associated, for example, he testified that his company back ordered, i.e. failed to deliver for weeks, 600 cases of the two pound size, 540 cases of the one pound size, and equivalent quantities of the other sizes of Carolina Rice. (Tr. 2652, 2655-8). Similarly, Mr. Collins testified that unfilled orders to Met, Shopwell, Pioneer, etc., were running as high as 500 cases during September and October, 1973 (Tr. 2658).*

Notwithstanding those shortages, the documentary evidence -- Met's invoices to plaintiff -- and the testimony of plaintiff's store co-ordinator demonstrate that Met delivered some quantity of Carolina Rice to Appellant every week (e.g., Harris Tr. 1343-1365; Local 338 Exs. G, H (at pp. 5-6), I (at pp. 5-7), J, K (at pp. 5, 27), L (at pp. 5-6); Pl. Exs. 65B (at pp. 6-7), 85B).**

*As can be seen from the detailed factual appendices annexed to the Joint Brief of the other defendant-appellees, the level of scratches of Carolina Rice to Met's other customers in the Harlem target areas was as great as, if not greater than, the scratches to plaintiff. In addition, Met's Cost-Plus Books for the period (which are part of Shopwell's Ex. A), state that each size of Carolina Rice is on ration so as to afford each customer an opportunity to obtain equal amounts of that product. (See also, Tr. 2598-2601).

**For example, the October 24, 1973 delivery invoice (Pl. Ex. 85B) reflects a delivery of seven cases of Carolina Rice.

Second: The only other factual finding made by the District Court challenged by Appellant is that Met's other customers in the Harlem area were competitors of the plaintiff. Appellant now contends (Br. p. 28) that Met's other supermarket customers in Harlem were not competitors.

This represents a startling change in position. Appellant's operating personnel testified that these stores and indeed all grocery stores in Harlem were competitors (Tr. 1435, 1556, 1585-7).* Similarly, the moving affidavits asserted that Met's customers were "competitors" (See Glenn Aff. ¶¶4, 5; Walker Aff. ¶5;** Harris Aff. ¶31).

Appellant's change in position comes about only because the District Court found that Met had treated plaintiff and its other customers equally (Opinion pp. 19-23, 25).

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*Appellant's store co-ordinator thus testified:

"Q. Would you say that the smaller grocery stores in between are really not effective competitors as far as the Co-op is concerned?

"A. I would say that everybody in the business is a competitor." (Tr. 1556).

"A. Any store in Harlem is a direct competitor." (Tr. 1586; see also Tr. 1587).

**Similarly, during the course of the hearing, plaintiff's attorney argued that Met's other customers "are competing stores." (e.g. Tr. 1481).

Appellant's New Theories On Appeal

Since Appellant's theory that there was a conspiracy between defendant-appellees and Met to force plaintiff out of business by having Met fail to deliver grocery products when such products were being delivered by Met to its other customers was totally contradicted by the evidence and the District Court's factually detailed Opinion, Appellant's Br. shifts gears and now advances entirely different theories.

Appellant now apparently argues that the Robinson-Patman Act* was violated because defendant-appellees were able to obtain merchandise directly from national brand manufacturers whereas Appellant, who only deals with Met, was unable to obtain deliveries of those same products from Met during the August 28-October 24, 1973 period. Under that theory, Appellant does not contend that Met discriminated against plaintiff vis a vis its other customers. Instead, the discriminatory entities are the non-defendant manufacturers of national brand products such as Bumble Bee, Del Monte, Carolina Rice, etc. who do not deal with plaintiff. (Appellant's Br. pp. 29-31).

Appellant further apparently contends that the Robinson-Patman Act was violated because some defendant-appellees were able to receive price discounts and allowances. (Appellant's Br. pp. 29-30).

Both arguments are frivolous for a variety of reasons.

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* 15 U.S.C. § 13.

First: None of the manufacturers of dry grocery products referred to during the hearings, i.e., Bumble Bee, Motts, Del Monte, Libby's, Carolina Rice, etc., are defendants in this action. There is no allegation in the complaint which directly or indirectly refers to them.

Second: While plaintiff was directed to and did in fact serve a written submission on November 21, 1973 (hereafter "Appellant's Thanksgiving Submission") which purported to list "all offending parties" including non-defendants such as Met, that Submission did not name or refer to manufacturers of dry grocery products. Moreover, while Appellant's Thanksgiving Submission purported to list all of the matters in violation of the antitrust laws which plaintiff contended were involved in the hearing, no mention was made of these new theories or grievances.

Third: To the extent that Appellant's new theory concerns alleged discrimination in the availability of products, it ignores the District Court's explicit finding that shortages were endemic in the industry during the summer and fall of 1973 and the further finding that its competitors suffered equally. (Opinion pp. 4, 23-5). It likewise ignores the voluminous evidence in the record from defendants' officers, plaintiff's expert witnesses and unrelated witnesses such as Mr. Collins of Carolina Rice who all testified about various industry-wide food

shortages,* that manufacturers had withdrawn products from sale, had place them on ration or had back-ordered orders. See supra pp. 19-23; Opinion pp. 23-4

Fourth: If Appellant is really contending that national brand manufacturers discriminate because some of their products are sold directly to large chains whereas the rest are sold to wholesalers who, in turn distribute to smaller chains and single unit stores, then some of the defendants are in the same position as plaintiff.*** For example, Sloan's buys most of its dry grocery products from a wholesaler, non-defendant Krasdale; *** Kaufman's supermarket buys its groceries from another wholesaler, defendant Pioneer. (Tr. 254, 545).

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*The existence of nationwide shortages in food products was widely discussed in the media throughout 1973 (See Local 338 Ex. F). Documentary evidence produced by the defendants is corroborative. For example, Sloan's Ex. A in evidence is a series of computer print-outs from August through October 24, 1973 of products which were ordered but not delivered (Tr. 283-5). They include Bumble Bee fish, Del Monte canned fruits and vegetables, Libby canned meats, Carolina Rice, etc.

**Rosenblum, prior to going bankrupt in 1973, purchased his groceries from Met and owes that non-defendant between forty to fifty thousand dollars (Tr. 517, 533-4).

***Krasdale's scratch ratio to Sloan's during the late summer and early fall of 1973 was running at a rate of 15-20 percent (Tr. 304-5). If anything, Krasdale's scratch rate to Sloan's was equal to or higher than Met's scratch rate to plaintiff. (See Opinion pp. 21-3, 38, fn 24).

Fifth: Moreover, the testimony of plaintiff's witnesses demolishes its new claims of discrimination by the non-party manufacturers. Appellant's expert witness, Mr. Neumark, testified that manufacturers of national brand products do not ship directly to single unit supermarkets because "from the point of view of the manufacturer that it would just be prohibitive in cost." (Tr. 160-2; see also Tr. 54-5).* He further testified that manufacturers of dry grocery products, sell their products only to independent wholesalers or large chains which maintain central warehouses. (Tr. 54-5; 163-4). Appellant does not operate a warehouse and, according to Mr. Neumark, it would not be economically feasible for plaintiff to do so unless it were doing at least fifteen million dollars annually** -- more than seven times plaintiff's highest sales ever. (Tr. 163-4). Indeed, Mr. Neumark also stated that a single unit supermarket such as plaintiff would find the expense of handling shipment documents from a hundred national brand manufacturers "prohibitive". (Tr. 54).

Similar testimony was elicited from Mr. Shepherd, an officer of non-defendant General Foods Corporation.

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*The only exceptions to that general practice, mentioned by Mr. Neumark, are that manufacturers of certain beverages, cookies and baby foods often deliver directly to single unit supermarkets. (Tr. 160-1). Those products were not involved in the hearing before Judge Pierce.

**In plaintiff's highest sales year -- the fiscal year ending April 7, 1973 -- its sales were slightly more than two million dollars. (See Local 338's Ex. FF).

Mr. Shepherd stated that it was uneconomical for a manufacturer and probably for a single unit retailer to buy products direct; that General Foods could not make distributions to 250 thousand stores economically; and that the function of the wholesaler was to gather all products together and then distribute to retailers on a more economical basis. (Tr. 2249-50; see also Tr. 2274-5). He further testified that since at least 1951, it has been the policy of General Foods not to sell directly to single unit supermarkets (Tr. 2279), that the making of that policy did not arise or change when plaintiff began doing business in 1968 (id.), and that neither Local 338 nor any of the defendants nor any non-defendant wholesalers such as Met had any input or discussion with General Foods respecting those policies (Tr. 2280-1). Mr. Shepherd also denied that General Foods has any agreement with Sloan's, Pioneer, Met or any other company which precludes General Foods from selling to plaintiff (Tr. 2277-8).

Sixth: This new claim of discrimination by non-defendant manufacturers of national brand products is also belied by the testimony of Mrs. Harris, Appellant's store co-ordinator, who orders all merchandise for the store. Mrs. Harris testified that she had never sought to buy directly from or had any other contact with the national brand manufacturers (Tr. 1357-9). Rather, in the four years that she has worked in the store, those products were only ordered from non-defendant wholesalers such as Met.

Seventh: To the extent, Appellant's new Robinson-Patman theory relates to alleged discrimination in prices, terms or allowances by national brand manufacturers, it must be pointed out again that they are not parties, they do not sell to plaintiff and thus they cannot be discriminating in terms of prices or allowances.

Eighth: In addition, the record is devoid of evidence as to the prices charged or allowances afforded by any manufacturer to any defendant. There is thus no basis for determining whether or not plaintiff was charged more for a product by Met than some defendant was charged by its supplier.

Ninth: There is substantial evidence in the record that Met made available a wide gamut of price discounts, promotion allowances, etc. to plaintiff and its other customers. Everyone of the forty-two Met Cost-Plus Books in evidence (Shopwell Ex. A) contains numerous pages of products being offered for sale on discounts, special deals, etc.

In addition, Mr. Shepherd, plaintiff's witness from General Foods, testified that he had analyzed Met's invoices to plaintiff for a period of time and found that Met was passing on all promotional deals, that its prices to plaintiff were "very favorable" and that in instances Met was charging plaintiff less than General Foods was charging its

direct purchasers. (Tr. 2264-8, 2281-2). While on the stand, Mr. Shepherd also reviewed one of the current Met Cost-Plus Books and pointed out a multitude of General Foods' products listed therein on special promotions or deals. (Tr. 2282-4).

It is thus little wonder that the District Court concluded that plaintiff's allegations against non-defendant national brand manufacturers were not supported by the testimony and were otherwise "so incomplete and vague that it must be deemed to have abandoned the theory." (Opinion fn 27).

Appellant's Contentions Respecting the Proof of Conspiracy

There was no testimony by any of the nineteen witnesses in the preliminary injunction hearing as to any agreement, meeting or discussion between Met and any one or more defendants respecting or concerning plaintiff. Met's president testified that there were no communications on any subject matter with defendants Local 338, Shopwell, Mid-Eastern, Pioneer and Associated. See Court Ex. 7; see also Transcript before Magistrate Jacobs at pp. 31-2.*

*On December 13, 1973, a hearing was held before Magistrate Jacobs at which testimony was taken of Met's president respecting Met's compliance with various subpoenas served by plaintiff. In response to questions posed by plaintiff's attorney, Met's president testified that there had been no written or oral communications with Local 388, Shopwell, Pioneer, Associated, Mid-Eastern, etc. during the three year period covered by the subpoena.

Similarly, the record is devoid of any evidence that Local 338 or Sloan's or Shopwell or Mid-Eastern, etc. discussed plaintiff, or any topic relating to plaintiff with each other, let alone conspired to drive plaintiff out of business.

The only purported "evidence" offered by plaintiff respecting the existence of the alleged conspiracy were the fragments of deposition testimony and interrogatory answers set forth in the Opinion (at pp. 28-9)* For example, the only purported "conspiracy" evidence respecting Met is that "prior to 1970, Met Food was the supplier for defendant Sloan's Supermarkets, Inc. until Sloan's switched its account to another supplier for better service" and that "defendant Theodore Solomon, Executive Director of A.G.H. 'knows' Harry Lefkowitz who is presently employed by Met Food and who was president of A.G.H. 'prior to closing his Harlem store . . . in 1968.'" (Opinion p. 28). That is hardly evidence that Met is a party to a conspiracy with Solomon, Sloan's or anyone else.

With respect to Local 338, the only "evidence" offered by plaintiff is that the president of Local 338's son, "Stephen Karsch, is married to Max Sloan's daughter" and that the

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*As was noted above, such evidence was received into evidence subject to connection, even though the Court below determined that "many" of appellee's objections "are valid." Opinion p. 39, fn. 28. Since no conspiracy was shown, there was no connection. id.

son "holds executive positions in many of Sloan's realty subsidiaries." (See Coop Br. p. 25; Opinion p. 28). There is absolutely no attempt to show how that marriage could have the least possible effect on plaintiff. Sloan's has not bought grocery products from Met for more than three years and, of course, that supermarket chain is not in the business of selling grocery products to other supermarkets, such as Appellant. Moreover, as is apparent from the Opinion and the evidence, Sloan's, just as plaintiff, suffered substantial food shortages and scratches during the summer and early fall of 1973 See supra at pp. 19-20.

Furthermore, Appellant's theory that a gigantic conspiracy between Met, Sloan's, Shopwell, Local 338, Fedco, and the other defendant-appellees to put plaintiff out of business is belied by the undisputed finding of the District Court that Met has not discriminated against plaintiff or any other customer (Opinion p. 23).

Finally, it is obvious that Appellant cannot meet its burden of proving the existence of the conspiracy alleged in the 1973 proceedings by referring to the decision and order of Judge Mansfield in November, 1970. Shopwell, Sloan's, Fedco, Associated, Pioneer and Mid-Eastern were not participants in the 1970 preliminary injunction proceedings. Moreover, the hearings before Judge Mansfield concerned a strike which has now been over for more than three years.

Indeed, it is well settled that determinations on the motions for preliminary injunctions, such as the one decided by Judge Mansfield in 1970, are merely "preliminary" and are not binding in any subsequent trial. See e.g., Ross-Whitney Corp. v. Smith Kline & French Labs, 207 F.2d 190, 199 (9th Cir. 1953); Benson Hotel Corp. v. Woods, 168 F.2d 694, (8th Cir. 1948). Furthermore, there is no presumption that the alleged conspiracy involving Hulan Jack, C.C.S., the Overtons, etc., which was the basis for Judge Mansfield's preliminary injunction order in November 1970, continued through 1973.* See e.g., Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F.2d 533, 535 (2d Cir.), cert. den., 360 U.S. 912 (1959); Goldlawr, Inc. v. Shubert, 290 F. Supp. 482, 510 (E.D. Pa. 1968). This is particularly so since plaintiff's attorney stated that those alleged "core" defendants were not involved in the situation which gave rise to the 1973 preliminary injunction proceedings.

Simply stated, despite a six-week hearing in which Appellant called nineteen witnesses, no proof has been even offered to show that Local 338 (i) conspired with Met or any

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*Local 338's involvement in the 1970 preliminary injunction proceedings arose from its alleged ratification of Joe Overton's activities. In light of the fact that the Overtons and other "core" defendants were released from the 1973 preliminary injunction proceedings and the further fact that Joe Overton ceased functioning as a union business agent fifteen months prior to the period covered in the recent proceedings, there can be no claim of a continuing conspiracy.

other non-defendant supplier, (ii) conspired with any of the appellees involved in the recently completed preliminary injunction hearings, to cause Met or any other actual or potential supplier or any non-defendant national brand manufacturer not to deliver goods to plaintiff; or (iii) had in any way violated the provisions of Judge Mansfield's 1970 preliminary injunction order. The record is equally barren with respect to the other defendant-appellees. Consequently, the District Court concluded that no conspiracy had been proven. (Opinion pp. 4, 29-30).

ARGUMENT

The Legal Standards for Determination of this Appeal

A motion for a preliminary injunction is addressed to the judicial discretion of the District Court. Therefore, the Order below may not be reversed unless this Court were to determine that the findings of fact were clearly erroneous and that Judge Pierce abused his discretion in dismissing after plaintiff rested. Rule 52(a) F.R.C.P.; Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), cert. den., 394 U.S. 999 (1969).

Moreover, since a preliminary injunction is an extraordinary remedy, it will not be granted except upon a clear showing of probable success and possible irreparable injury, See, Intercontinental Container Transport Corp. v. N.Y. Shipping Ass'n., 426 F.2d 884 (2d Cir. 1970); Clairol, Inc. v.

Gillette Co., 389 F.2d 264, 265 (2d Cir. 1968); Exhibitors Poster Exchange, Inc. v. National Screen Serv. Corp., 441 F.2d 560 (5th Cir. 1971).

Certainly, in the absence of a conspiracy, Met, like any other seller, was entitled to sell, or not to sell to any customer or to sell him as much as it saw fit. See Times-Picayune Pub. Co., v. United States, 345 U.S. 594, 625 (1953); Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743, 747 (N.D. Calif.), aff'd, 322 F.2d 656 (9th Cir.),cert. den.,375 U.S. (1963); Ace Beer Distr. Inc. v. Kohn, Inc., 318 F.2d 283, 287 (6th Cir.), cert. den., 375 U.S. 922 (1963).

Furthermore, an allocation system is not an illegal method of distribution in times of short supply since any other approach would favor some customers at the expense of others who would be totally deprived of their necessary supplies. See, Independent Iron Works, Inc. v. United States Steel Corp., supra.

Moreover, in addition to the fact that Appellant's Br. nowhere challenges the District Court's factual finding respecting industry-wide shortages and Met's equality of treatment to plaintiff and its other customers, it must be pointed out that Met delivered the vast preponderance of the items which plaintiff ordered. The statistical analysis set forth in the Opinion (pp. 19-21), thus shows that for the week of August 28th, plaintiff was scratched 10% of

the cases ordered, but received delivery of 90%. The same analysis shows that during that same week other Met customers had their orders scratched in equivalent or in some instances, far greater percentages -- up to 34%.

Similarly, in the next week covered by the District Court's analysis -- the week of September 10th (Opinion p. 38, fn 24) the scratch rates were: plaintiff, 17%; Cherrie, 15%; Food City, 21%; Food Pageant, 26%; Sureway, 16%; Teitler, 15%. The converse of those statistics represents percentages of goods ordered and delivered. Plaintiff and three of its competitors received between 83 to 85 percent of the cases ordered; two of plaintiff's competitors only received 71 and 74 percent respectively of their orders.

Finally, to the extent that plaintiff was scratched in a particular size or type of canned peaches, or fish, or canned meats, etc., the documentary evidence and testimony demonstrates that those same products were scratched in the same weeks to Met's other customers who ordered those products. (See, e.g., Local 338 Ex. PP, QQ; Tr. 1252-89). In that regard, we direct this Court's attention to the various charts appended at the end of the Joint Brief submitted by the other appellees.*

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*Those charts were set forth in defendants' Factual Memorandum to the District Court after it became apparent that the development of such comparisons through live witnesses would unduly prolong the hearing (Tr. 1252-89; see also Tr. 803-16).

Simply stated, the District Court's statistical analysis not only demonstrates that no discrimination was practiced, but also destroys Appellant's contention that Met was the instrument of a conspiracy to drive it out of business.

Furthermore, since there was no discrimination by Met, little need be said respecting Appellant's total failure of proof of conspiracy. Rather, it is sufficient to note that Appellant had the burden of proving (i) that a conspiracy to deprive plaintiff of critical food products in violation of antitrust laws existed during the relevant time period, i.e., from August 28 to October 24, 1973; (ii) that each of those charged, i.e., Sloan's, Shopwell, Local 338, Met, Pioneer, etc., knew of the conspiracy and its objectives; and (iii) that each knowingly participated in or joined the conspiracy. See e.g., United States v. Falcone, 311 U.S. 205, 210-11 (1940); United States v. Cianchetti, 315 F. 2d 584, 588 (2d Cir. 1963); Stanley v. United States, 245 F. 2d 427, 430 (6th Cir. 1957); United States v. Ward Baking Co., 224 F. Supp. 66, 69 (E.D. Pa. 1963); TIMBERLAKE FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS, p. 207 (1965 ed.); Klein v. American Luggage Works, Inc. 323 F. 2d 787, 791 (3d Cir. 1963); Johnson v. J.H. Yost Lumber Co., 117 F. 2d 53, 62 (8th Cir. 1941). Here, there was no evidence against Local 338 with respect to any of those elements. The record is equally barren of any such evidence with respect to non-defendant Met or any of the other defendants at bar.

In order to sustain claims under the Robinson-Patman Act,* a plaintiff must prove, inter alia, that the defendant has discriminated against it with respect to price, allowances, etc., (ii) that one of the sales had been across state lines, (iii) that the discriminating defendant had affected sales to plaintiff and one or more of its other customers at different prices or terms, (iv) that the discrimination substantially lessened competition or tended to create a monopoly, and (v) that it has been damaged by such discrimination. See, e.g., International Film Center, Inc. v. Graflex, Inc., 427 F.2d 334 (3d Cir. 1970); Elgin Corp. v. Atlas Buildings Prods., Co., 251 F.2d 7, 11 (10th Cir. 1958); Sano Petroleum Co. v. American Oil Co., 187 F. Supp. 345, 353-4 (E.D. N.Y. 1960); Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267 (N.D. Calif. 1971); Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), aff'd, 237 F.2d 13 (3d Cir. 1956).

Since plaintiff does not buy products directly from national brand manufacturers, there can be no claim that those non-parties have violated the Robinson-Patman Act.

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*While the Appellant's Br. also makes reference to the Federal Trade Commission Act (15 U.S.C. §45) and cases brought by the Commission, the authorities are clear that a private litigant has no right of action under that Act. See, e.g., Frederick Chusid & Co., v. Marshal Leeman & Co., 326 F. Supp. 1043, 1063 (S.D.N.Y. 1971); La Salle Street Press Inc. v. McCormick & Henderson, Inc. 293 F. Supp. 1004, 1006 (N.D. Ill. 1968), aff'd, 445 F.2d 84 (7th Cir. 1971).

Klein v. Lionel Corp., supra, is directly on point. There, Lionel, a manufacturer of toys, sold its products to jobbers and to the various defendant chain stores and mail order houses at the same price. Plaintiff, however, was unable to purchase directly from the manufacturer and instead bought toys from a jobber at prices which exceeded those paid by the defendant chain stores who bought directly from Lionel. The District Court, in granting motions for summary judgment made by Lionel and the defendant competitors, held that there was no cause of action under the Robinson-Patman Act, stating:

> "Lionel, the manufacturer, as above stated, sells to chain stores and mail order houses at a discount from the retail price of 40% plus 20% (equivalent to 52%); it sells to jobbers or middlemen at precisely the same discount of 40% plus 20%. Klein, the plaintiff, does not and has not bought from Lionel. He buys and has bought only from the jobber or middleman at a discount of 40%."
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> "Klein contends that since he is in competition as a retailer with the chain stores, mail order houses and department stores he is entitled to the largest discount as enjoyed by any of them, viz. 40% plus 20%. He contends that since he can only buy from a middleman at a discount of 40% and since the middleman must, economically, make a profit on the sale to him , that the discount to the chain stores and mail order houses is discriminatory."
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> * * *
>
> "I am of the opinion that under Section 13(a) of the Robinson-Patman Act, as consolidated into Title 15 U.S.C.A., it is requisite in order to show any actionable unlawful conduct in a discrimination in price that there must be two purchases from the party charged with such discrimination and that such discrimination involve two purchasers. This is (a) shown by the language of the Act; (b) it is buttressed by the clear legislative history of the Act, and (c) it is so construed by the courts."

"The plaintiff contends that as a retailer and purchaser from a middleman and in competition with chain stores and mail order houses, he is discriminated against unless he receives, likewise, a discount of 40 and 20%. In effect, he contends that in order to obtain the same discount that the chain stores and mail order houses enjoy and at the same time allow a reasonable profit to the middleman or jobber from whom Klein must purchase, that the discount allowed to the middleman or jobber must be considerably in excess of that allowed to chain stores and mail order houses. It is difficult to see, however, how the conclusion contended for would not result in a flagrant violation of the Robinson-Patman Act and accomplish precisely that which the Act was intended to prevent, viz., a discrimination in price between two purchases from the same seller." (138 F. Supp. at pp.562-5)(emphasis added).

In affirming, the Third Circuit stated (237 F.2d at pp. 14-15):

"The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination (citation omitted) . . . . Therefore at least two purchases must have taken place. . . . Klein did purchase Lionel products but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein therefore can claim no protection under the Act as a direct purchaser." (emphasis added)

Accord: Merck & Co. v. Bronx Drug Co., 1963 Trade Cases, ¶70, 954 (S.D.N.Y. 1963) (not officially reported).*

It is also well settled that a manufacturer's unilateral refusal to deal with a retailer does not give rise to any claim under the Robinson-Patman Act or the antitrust laws. See e.g., New Amsterdam Cheese Corp. v. Kraftco Corp., CCH Trade Cases, ¶74,669 (S.D.N.Y. 1973) (not officially reported); Tripoli Co. v. Wella Corp., 286 F. Supp. 264

*There is no evidence in the record to suggest that national brand manufacturers control Met's prices.

(E.D. Pa. 1968), aff'd, 425 F.2d 932 (3d Cir.), cert. den., 400 U.S. 831 (1970).

A fortiori, Appellant's vague claims against non-defendant manufacturers of dry grocery products, who unilaterally decided not to sell directly to single unit supermarkets, such as plaintiff, are simply not actionable under the Robinson-Patman Act or the antitrust laws.

Equally significant is Appellant's total failure of proof respecting the other requisite elements of a Robinson-Patman claim. See supra at p. 39 ; Opinion p. 16 . The instant record is thus similar to the lack of evidence in Rutledge v. Electric Hose & Rubber Co., supra, where the Court dismissed an action, stating (327 F. Supp. at pp. 1275-7):

> "Plaintiffs presented no proof of purchase by them supporting liability. Nor have plaintiffs offered proof of sales to alleged 'favored buyers' which show discrimination when compared to plaintiff's purchase. Plaintiffs have also failed to show at least one of two such sales was made in interstate commerce. Likewise, plaintiffs have left this Court without any viable proof that the alleged discrimination had the effect of substantially lessening competition or injuring plaintiff. Nor have they successfully assailed the statutory defenses asserted by the hose defendants under section 2(a).
>
> * * *
>
> "Section 2(a) can be tested only against specific sales and not by a showing of a general pricing system. Proof of the existence in the hose industry of customer classifications under which different prices are offered to different levels of the trade

is not a showing of a section 2(a) violation. Consequently, plaintiff's evidence has failed to establish a 2(a) violation by the hose manufacturing defendants in the present case.

* * *

"The burden of plaintiffs in establishing a section 2(f) claim is to show that one or more of the couplers induced a hose manufacturer to sell to him at a price which discriminated and which the buyer knew was not within one of the seller's defenses under sections 2(a) and 2(b) of the Robinson-Patman Act, such as that the price differentials reflect cost differences, were the result of fluctuating market conditions or amounted to bona fide attempts to meet competition. (citation omitted).

* * *

"Plaintiff's task was to take each coupler they intended to prove a 2(f) claim against and show that by reason of conversations had with a seller of hose, or by some other conduct, that coupler induced the seller to sell to him at a lower price which was discriminatory and which was, as known to the coupler, not cost justified. In a Robinson-Patman action he is required to make this showing by a meticulous attention to details. J. Weingarten, Inc. 62 F.T.C. 1521, 1927.

"A buyer is not liable under this section merely upon a showing that he knowingly induced and received a lower price. Texas Gulf Sulphur v. J.R. Simplot, supra, 418 F.2d at 803. Nothing in section 2(f) is intended as "putting a buyer at his peril whenever he engages in price bargaining." Automatic Canteen, supra, 346 U.S. at 73, 73 S.Ct. at 1024. There is a burden upon the complaining party to show that the price differential exceeded any cost savings the seller may have enjoyed in sales to the favored buyer. Automatic Canteen, supra, at 62, 73 S.Ct. 1017. Since plaintiffs have failed to meet their burden, the claim under section 2(f) must fail."

The lack of evidence in the case at bar is even clearer. Here, as the Opinion clearly states (p. 38, fn 23), none of the appellees who are in business, i.e., Shopwell, Sloan's, Fedco, Kaufman, Associated, Pioneer and Mid-Eastern, buy any grocery products from Met. Consequently, there can be no claim that they induced Met to afford them discriminatory

prices. Moreover, there is not a scintilla of evidence respecting the prices or terms afforded by the non-defendant national brand manufacturers to appellees who buy products from such manufacturers.* Furthermore, there is neither documentary evidence nor oral testimony that any appellee had a conversation with a single national brand manufacturer respecting any topic, let alone evidence that any non-defendant manufacturer was induced to sell to one or more of the appellees at discriminatory prices. Finally, no proof was offered by appellant as to how the alleged discrimination in prices or terms substantially lessened competition or injured plaintiff. Consequently, the District Court correctly ruled that "Plaintiff's proof virtually ignored [t]he fundamental elements of discrimination." (Opinion p. 16).

Even assuming arguendo, however, that plaintiff can establish a Robinson-Patman claim against some manufacturers of national brand products, or that Met does discriminate against Appellant, what does that have to do with Local 338? There is no claim and certainly no evidence that Local 338 had any input into the policies, the prices charged or allowances offered by any national brand manufacturer, Met, or any other actual or potential supplier of goods to plaintiff. Indeed, the testimony of plaintiff's expert witness, Mr.

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*Similarly, there is no evidence respecting the prices at which Sloan's buys its grocery products from non-defendant wholesaler, Krasdale.

Neumark and non party witnesses, such as Mr. Shepherd, demonstrates that manufacturers of dry grocery products do not deal with single unit supermarkets because the costs would be "prohibitive." If plaintiff wishes nevertheless to assert a claim against its suppliers, it should sue them either in a separate action or by seeking to amend its complaint herein. But those grievances do not involve Local 338.

Labor Unions Are Immune From Antitrust Laws Except When There Is Clear Proof of an Illegal Agreement With a Non Labor Organization

In light of Appellant's total failure of proof against any of the appellees, only a few brief comments need be made with respect to the statutory and decisional authorities which immunize labor unions from the impact of the federal antitrust laws. That immunity can only be lost by "clear proof" that a labor union has conspired with a non labor entity. See e.g., United Mine Workers of America v. Gibbs, 383 U.S. 715, 737 (1966); Brotherhood

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*That standard was established by Congress in Section 6 of the Norris-Laguardia Act (29 U.S.C. §106). "Clear proof" was defined in United Mine Workers of America v. Gibbs, supra, to require far more than the ordinary civil burden of persuasion. Rather, plaintiff is required "to persuade by a substantial margin" in any antitrust action brought against a labor union. 383 U.S. at p. 737.

of Carpenters v. United States, 330 U.S. 395 (1947); Truck Drivers' Local No. 421 v. United States, 128 F.2d 227 (8th Cir. 1942).

Despite the fact that Local 338 was not even mentioned in the moving affidavits, the union was compelled to undergo the expense of a six week hearing dealing with plaintiff's grievances against non-defendants solely upon the oral statement of Appellant's attorney that the "union influence is a strong tie into what happens." (Oral Argument Oct. 30, 1973, Tr. 31-2). No evidence was even offered as to how Local 338 was responsible for (i) adverse weather conditions, (ii) the various changes in the federal regulations governing the prices of food products, (iii) increased exports of food products such as wheat, soybeans and rice, (iv) canners' strikes in California, (v) the shortage of steel needed to make cans, or (vi) any of the other reasons given by plaintiff's witnesses for the widespread food shortages in the summer and fall of 1973.

In the 2,732 pages of testimony before Judge Pierce, Local 338 was only mentioned approximately six times. In two of the references plaintiff's witnesses, Mr. Maidenbaum of Met and Mr. Shepherd of General Foods, denied having any communications with the union. See supra at pp. 29, 31.

The only other mention of the union is the testimony of various defendants that Local 338 represented grocery

clerks in their supermarkets and the supermarkets of Met's other customers. If anything, that testimony negates the existence of a conspiracy for the simple reason that the District Court found that, during the late summer and fall period of 1973, the other defendant-appellees and the non-defendant Met customers all suffered, as badly as Appellant, from food shortages. (Opinion pp. 4, 21-5, 38 fns. 23-4).

Nowhere in the Appellant's Br. is there even a suggestion that the evidence showed any conspiracy between Local 338 and Met, or any other actual or potential supplier. Indeed, Local 338 is only mentioned twice in the pertinent portion * of Appellant's Br. for the unsupported proposition that there was an "interrelationship" with appellee, Mid-Eastern (Appellant's Br. pp. 32-3). Such a relationship is nowhere mentioned in the 2,732 pages of testimony before Judge Pierce or in the hundreds of exhibits introduced into evidence.

Simply stated, the record at bar contains, in the words of Judge Pierce, "not . . . a scrap of evidence" of a conspiracy "to put plaintiff out of business or to form an oligopoly to control the Harlem market." (Opinion p. 30).

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*Most of Appellant's Br. ignores the pertinent facts developed in the hearing and is instead devoted to a purported listing of discovery schedules and prior motion practice. Such a recitation -- even if accurate -- is irrelevant on this appeal particularly in light of the District Court's statement (Opinion p. 8) that plaintiff was responsible for most of the time consuming diversions. What is relevant is the evidence elicited before Judge Pierce during the hearings--a record which is almost totally ignored by Appellant.

A fortiori, Appellant did not meet its burden of demonstrating by "clear proof" that Local 338 was involved in the situation that gives rise to the recently concluded preliminary injunction hearing.

CONCLUSION

THE ORDER OF THE DISTRICT COURT OF FEBRUARY 7, 1974 SHOULD BE AFFIRMED.

Respectfully submitted,

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